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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 506

UNITED STATES OF AMERICA, EX REL. MAY JOHNSON,

Petitioner,

v.

W. FRANK WATKINS, DISTRICT DIRECTOR, ETC.

BRIEF FOR ASSOCIATION OF IMMIGRATION AND NATIONALITY LAWYERS, AMICUS CURIAE

JACK WASSERMAN,
Attorney for Association of Immigration and Nationality Lawyers, Amicus Curiae.

GASPARE CUSUMANO,
THOMAS M. COOLEY, II,
Of Counsel.

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Introduction

The Association of Immigration and Nationality Lawyers is a national association of lawyers admitted to practice before the Immigration Service and the Board of Immigration Appeals. Some of its members are former officials of the Immigration Service and the Board of Immigration Appeals.

The Association is interested in advancing the science of the administration of law pertaining to immigration, nationality and naturalization.

We submit this brief and ask leave of the Court to file it as *amicus curiae* because of our interest in the issues involved in the present case.

Statement

Petitioner, May Johnson, arrived in the United States with an appropriate immigration visa on March 1, 1948. On March 11, 1948, two Public Health Service surgeons, Dr. Magnum and Dr. Pasquarelli, certified that she was "found afflicted with Mental Defective Class 'A' ". The certificate was not in affidavit form and contained neither a diagnosis nor a statement of the basis for the conclusion reached. The qualifications of the signers were not set forth. An unsuccessful appeal to a medical board was pursued in conformity with 8 U.S.C. 152. Thereafter hearings were held in New York before a Board of Special Inquiry composed of two immigration officials and a secretary-stenographer who acted as a member of the Board. The Board of Special Inquiry considered itself bound by the medical certificate and directed the exclusion of petitioner. The view that the Board of Special Inquiry was conclusively bound by the medical certificate and that the Administrative Procedure Act (5 U.S.C. 1004, 1010) was inapplicable has been affirmed below. (82 F. Supp. 36 and 170 F. (2d) 1009.) Judge Clark dissented "because of the inadequacy of the original certificate of the examining surgeons and total failure of the reviewing Board of Medical Officers to comply with the regulations."

ARGUMENT

I. The Board of Special Inquiry Was Not Conclusively Bound by the Medical Certificate

The First [1] and Ninth [2] Circuits have held that immigration officials are not bound by medical certificates in exclu-

[1] In *Billings* v. *Sitner*, 228 Fed. 315 (C. C. A. 1st, 1915) the board of special inquiry voted to exclude an immigrant "because it assumed that a certificate of the medical officer who had examined him under Section 17 of the Act to the effect that he was feeble-minded and his vision was defective, of itself bound the board to exclude, notwithstanding any other

sion proceedings but are required to exercise their "own judgment after considering not only the certificate but whatever other evidence there may be touching the alien's right to enter." These Circuits have so interpreted the Immigration Act of 1907 as well as the Act of 1917.[3] No major change was made as to the effect of medical certificates upon the passage of the 1917 Act. Section 10 of the Immigration Act of 1907 [4] was merely transposed into a proviso in the concluding part of Section 17 of the Immigration Act of 1917.[5] The language of the 1917 Act [6] reads exactly as does that of the 1907 Act [7] that medical certifications shall be for "*the information of the immigration officers.*"

In *United States* v. *Tod*, 1 F. (2d) 246 (C.C.A. 2d, 1924), the Second Circuit ruled that the determination of the

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evidence." The Circuit Court ruled that: "Such a construction would result in giving the inspecting medical officer, instead of the board, the power of final decision. Although immigration rule 17, subdivisions 4, 5 (note), state that the board is 'virtually compelled' to base its decision upon the certificate, we hold that it has no right to do so without exercising its own judgment after considering not only the certificate, but whatever other evidence there may be touching the alien's right to enter." *In Ex parte Joyce*, 212 Fed. 282, 284 (D. C. Mass. 1913) it was said: "The board of special inquiry is not bound by the opinion of the medical board, and ought, in reaching a decision, to consider all evidence which is brought to its attention." And in *Ex parte Liang Buck Chew*, 296 Fed. 182 (D. C. Mass. 1923) the court stated: "It is going a long way to say that the action of the medical officer is absolutely final, however capricious, unfounded and unreasonable it may be. If that had been the intention of the act, it would, I think, have been stated in explicit terms, but there is no such language. The status of the certificate appears to be established by section 16; it is made for the *information* of the immigration officers and the boards of special inquiry. The proviso of section 17 appears to mean that rejection because of disease is certified by a health officer, and to be in the nature of a limitation on the powers of the boards of special inquiry."

[2] *Gee Shew Hong* v. *Nagle*, 18 F. (2d) 248 (C. C. A. 9th, 1927).

[3] *Ex parte Liang Buck Chew*, 296 Fed. 182 (D. C. Mass. 1923) and *Gee Shew Hong* v. *Nagle*, 18 F. (2d) 248 (C. C. A. 9th, 1927) so interpret the 1917 Act.

[4] 34 Stat. pt. 1, p. 901.

[5] 39 Stat. 887.

[6] Sec. 16 of the 1917 Act, 39 Stat. 885.

[7] Sec. 17 of the 1907 Act, 34 Stat. pt. 1, p. 903.

medical officer was decisive. The judgment was reversed by the Supreme Court on confession of error by the Solicitor General (267 U. S. 571, October 1924 Term). The basis for the confession of error is set forth in a letter from the Department of Justice to the Secretary of Labor which reads as follows:

"January 13, 1925.

The Secretary of Labor,
Washington, D. C.

Re: United States ex rel. Pauline Fink versus
Tod, Commissioner of Immigration

SIR:

Pursuant to our conversation with Mr. White, Assistant Secretary of Labor, this Department came to the conclusion that it would be unwise and unjust for the Government to argue the appeal in this case.

Accordingly, it was decided that the Government should confess error, instead of arguing. Quite apart from considerations of humanity, it was felt that such a course was the only one which could be supported alike by sound law and sound policy.

The Solicitor General approved of this course; and when the case was reached in the Supreme Court late this afternoon, he, appearing on behalf of the Government, confessed error. In the course of the next few days, the Court will enter an order granting the writ of habeas corpus and finally discharging the relator from custody.

Respectfully,

For the Attorney General,

(Signed) WILLIAM J. DONOVAN,
Assistant Attorney General."

Gee Shew Hong v. *Nagle*, 18 F. (2d) 248 (C. C. A. 9th, 1927) which followed this confession of error and the accom-

panying Supreme Court ruling can hardly be overlooked. The Court stated as follows:

> "As already stated, the appellant challenged the order of exclusion upon the ground that the first certificate given by the medical officers was final and that the second examination and certificate were unauthorized and void. This contention finds support in the decision in *United States v. Tod* (C. C. A.) 1 F. (2d) 246, but a writ of certiorari was there granted, 266 U. S. 599, 45 S. Ct. 125, 69 L. Ed. 461; and the judgment was later reversed on confession of error by the Solicitor General, 267 U. S. 571, 45 S. Ct. 227, 69 L. Ed. 793. We cannot agree that the medical certificate has any such finality or conclusiveness as is claimed for it. The power to admit and exclude aliens is vested in a board of special inquiry, subject to the right of appeal, not in the medical officers of the Public Health Service. The certificate is furnished "for the information of the immigration officers and the board of special inquiry" and is evidence and nothing more. True, an excluding decision is not final unless based on the certificate of the medical officers, but the certificate itself may be challenged, at least by the alien."

We therefore submit that the same "sound law and sound policy" which led to the acknowledgment that a medical certificate was not conclusive in 1925 likewise leads to the same result today.

II. The Medical Certificate Is Insufficient

The Second Circuit has frequently commented upon the insufficiency of medical certificates in immigration proceedings.[8] The Supreme Court has had occasion to comment

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[8] *U. S. ex rel Minuto* v. *Reimer*, 83 F. (2d) 166 (C. C. A. 2d 1936). In *U. S. ex rel Papa* v. *Day*, 45 F. (2d) 435 (S. D. N. Y., 1930) where an alien was excluded because of tuberculosis, the court stated that: "Medical certificates, however satisfactory they may be as interdepartmental memoranda, are not satisfactory as a basis for judicial action, and that for

on the legal sufficiency of medical certificates in immigration proceedings under Section 9 of the Immigration Act of 1917 where an administrative penalty was imposed against a steamship company for the transportation of diseased or physically defective aliens. In *Lloyd Societa Anomina Per Azioni* v. *Elting*, 287 U. S. 329, 339 (1932) Justice Stone stated:

> "The medical opinions did not reveal the facts upon which they were based, and they were formulated by physicians who, so far as appears, were not apprised of the fact that three previous examinations of the nature described had been made. The detailed information as to those examinations which petitioner submitted to the Secretary in this case might reasonably have affected the *expert judgment of the physicians at Ellis Island*. In relying upon their opinion alone, without putting these additional facts before them, we think the Secretary acted arbitrarily and unfairly."

Expert opinion derives its probative force from the facts upon which it is predicated and these must be legally sufficient to sustain the opinion of the expert.[9] In the instant case the medical certificate did not state the evidence upon which the conclusion was based,[10] it did not indicate the

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such purposes medical evidence should preferably be taken in question and answer form, but, if not so taken, should at least be in the form of an affidavit, with the qualifications and experience of the doctor or doctors fully set forth, together with the reasons for the opinion at which they have arrived." See also: *U. S. ex rel Fong On* v. *Day*, 39 F. (2d) 202, 203; 54 F. (2d) 990, and in *U. S. ex rel Powlowec* v. *Day*, 33 F. (2d) 267, 268 (C. C. A. 2d, 1929) where deportation was based on the ground that an alien was afflicted with constitutional psychopathic inferiority, Judge Learned Hand remarked: "It is indeed another matter whether the certificate should not itself state the evidence upon which the conclusion is based, and what efforts have been made to ascertain the facts between entry and arrest. Certainly that is desirable."

[9] *Rogers* on Expert Testimony, Third Ed. (1941) p. 109.

[10] Nor does it even indicate the qualifications of the medical examiners. We believe that the medical examiners herein did not meet the statutory requirements which specify that they have special training in the diagnosis

nature, extent, character or the severity of the mental defect certified. The certificate is of no aid in determining the disabling extent of the appellant's condition. This deficiency was not supplied by producing the medical examiner as a witness.[11]

Significantly, the Government has realized the deficiencies of the type of medical certificate here under consideration.

On May 28, 1945 the Chairman of the Board of Immigration Appeals sought to have the Commissioner of Immigration revise the medical certificate to include an accurate description of the nature and extent of the alien's condition. The memorandum is annexed as Appendix A. No modification took place. On September 30, 1947, however, the Public Health Service revised its regulations to define a medical certificate as a document certifying *findings* with respect to an alien's condition. 42 C. F. R. 34.2(c). A Medical Appeal Board is required to report *findings* as well as conclusions to the Immigration Service. 42 C. F. R. 34.13(b). (It is obvious that the medical certificate herein contains a mere conclusion without any findings.)

On October 16, 1947, the Association of Immigration and Nationality Lawyers conferred with reference to the short-

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of insanity and mental defects (8 U. S. C. A. 152). In judicial proceedings where expert witnesses are called upon to render an opinion based upon their personal observation or examination, they are first qualified as a witness and the facts upon which the opinion is founded must all be stated, otherwise the witness might be giving an opinion which would have great weight with the jury upon a state of facts very different from those found by them in the case on trial. The value of the opinion in other words, must depend very largely upon the facts on which it is based. *Rogers* on Expert Testimony, Third Ed. (1941) pp. 80-81, 315, 323; *Hitchcock* v. *Burgett*, 38 Mich. 501, 507 (1878).

Although administrative agencies need not follow the strict rules of evidence prescribed for jury trials, it is erroneous to suppose that agencies do not as a result, observe some rules of evidence. *Final Report of the Attorney General's Committee on Administrative Procedure*, Senate Document No. 8, 77th Congress, 1st Sess. (1941) p. 70.

[11] See 8 C. F. R. 130.4 and *U. S. ex rel Minuto* v. *Reimer*, 83 F. (2d) 166 (C. C. A. 2d, 1936).

comings of medical certificates with officials of the Public Health Service and the Federal Security Agency (which acts as counsel to the Public Health Service). Following that conference, a letter was addressed to the President of our Association which read in part as follows:

"FEDERAL SECURITY AGENCY

Washington

Zone 25

December 5, 1947.

Mr. Abram Orlow
700 Bankers Securities Building
Philadelphia 7, Pennsylvania

DEAR MR. ORLOW:

This is with further reference to your letter of October 16. Following conferences within the Public Health Service and consultation with officials of the Immigration and Naturalization Service, Dr. Dunnahoo has requested me to advise you as follows on the points enumerated in your letter:

1. The Public Health Service plans to advise its medical examiners to include in the medical certificate, in addition to the designation of the physical or mental disease or defect found and the classification symbol, a brief indication of the data or findings upon which the evidence is based. . . .

(S.) GLADYS HARRISON,
Assistant General Counsel."

On September 17, 1948 the Board of Immigration Appeals reopened a case where an alien was certified as mentally defective to obtain "a new medical certificate on the new or revised basis indicated in the letter above" [12] and on January 3, 1949, Vernon T. Davis, Director of the Neuro-

[12] Matter of El Anid, File No. A-6231824.

psychiatric Service at Ellis Island acknowledged that the outstanding regulations "require that the medical diagnosis be shown on the certificate in addition to the legal terminology required by law" [13]

Considering the present administrative practice the possibility of error in diagnosis by physicians and the fact that mental shortcomings due to ignorance, language difficulties, or remedial physical causes may not be certified as a mental defect (42 C. F. R. 34.7(d)) it is of vital importance to require complete and full medical certificates in conformity with the applicable regulations.

III. The Hearing Failed to Comply With the Immigration Statute and the Administrative Procedure Act

The immigration statute (8 U. S. C. 153) provides that a Board of Special Inquiry "shall consist of three members, who shall be selected from such of the immigration *officials* in the service as the Commissioner of Immigration and Naturalization, with the approval of the Attorney General, shall from time to time designate as qualified to serve on such boards."

The regulations (8 C. F. R. 60.29) issued under the statute provide that (1) immigrant inspectors, (2) all other employees assigned to act as secretaries of boards of special inquiry and (3) other persons (preferably government employees) may serve as members of a Board of Special Inquiry. Persons within the third category must subscribe to an oath of office but those within the second category need not.

A. *Non-compliance with the statute*

It is submitted that the regulations are in excess of the statutory authorization. Secretaries of the Board are

[13] In a memorandum to the District Director at New York in the case of Maria Jose Rodriguez, N. Y. File No. 0300/154733 SI/PX & PU.

qualified stenographers and nothing more. They are not immigration officials [14] and therefore the instant Board was not properly constituted. It is submitted that *United States ex rel. Minuto* v. *Reimer*, 83 F. (2d) 166, 167-168 represents neither well established law on this point nor a correct statement of the law. In addition it should be observed that the record is barren of any showing that the secretary-stenographer, who acted as a Board Member was assigned to so act in the instant proceeding.

B. *Non-compliance with the Administrative Procedure Act*

1. NOTICE. (5 U. S. C. 1004(a)). Under Section 5 (a) of the Act "a party must be given ample notice of the legal and factual issues with due time to examine, consider and prepare for them. To make that possible the issues must be specified with reasonable particularity, for which purpose the statement of issues in general statutory language of delegations of authority to the agency would not be sufficient." (*Senate Document No. 248, 79th Congress, 2nd Session*, p. 261). *The Attorney General's Manual on the Administrative Procedure Act* page 46 *et seq.* is to the same effect. In addition the Act requires timely notice of "the time, place and nature" of the hearing and "the legal authority and jurisdiction under which the hearing is to be held." These requirements only apply to "cases of adjudication required by *statute* to be determined on the record."

The Immigration Service has concluded that the admission of an alien involves an adjudication required to be determined by statute on the record. "The procedure provided in

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[14] Former Commissioner Carusi stated that "Each Board consists of three members, all of them *officers* of the Service except that in special cases at isolated ports, the Attorney General may determine it practicable to designate Government officials or other persons to serve on such Boards." *The Federal Administrative Procedure Act and the Administrative Agencies* (1947).

sections 16 and 17 of the 1917 Act was finally concluded by the Service in conjunction with the Department of Justice to be within the purview of the adjudication prescriptions of the Administrative Procedure Act. This was because of the provision found in Sections 16 and 17 of the 1917 Act which requires that an arriving alien not found clearly and beyond a doubt entitled to land shall be held for further examination by a Board of Special Inquiry. Such Boards are required to maintain records of their proceedings and the evidence taken by them and in cases in which appeal from their decision is allowable, the decision of the Attorney General is directed to be based upon the evidence adduced before the Board of Special Inquiry." (*House Report 2140, p. 4, 80th Congress, 2nd Session.*) The Immigration Service does not give timely advance notice of the legal and factual issues in exclusion cases and did not do so in the instant case. Only at the conclusion of the hearing was the alien advised of the grounds for detention and then in the conclusory language of the statute. The jurisdiction and the legal authority under which the Board of Special Inquiry operates is never set forth in any notice of hearing. It has been concluded that under the Administrative Procedure Act the Service "will have to clarify its practices with respect to the giving of notice to the alien of the agency hearing and the reasons therefor." (56 Yale Law Review 700). The Immigration Service in the instant case did not comply with 5 U. S. C. 1004 (a).

2. Separation of Functions is required by Section 5 (C) [5 U. S. C. 1004 (c)] of the Administrative Procedure Act where there is a statutory hearing. Excepted *inter alia*, are the top agency or members thereof and initial applications for a license. Hearing officers "may not hold ex parte private conferences, they may not be subject to the supervision of prosecuting officers, and prosecuting officers may

not participate in decisions except as witnesses or counsel in public proceedings . . . The purpose of the section is to assure that no investigating or prosecuting officer shall directly or indirectly in any manner influence or control the operations of hearing and deciding officers . . . The separation of functions here required must be reflected in the rules of organization and procedure issued pursuant to section 3(a)." (*Senate Document No. 248, 79th Congress, 2nd Session,* pp. 361, 262).

"As a practical matter this means that an agency's hearing examiners should be placed in an organizational unit apart from those to which investigative and prosecuting personnel are assigned, and that the examiners' unit should be under the supervision only of the agency itself or of agency officers who exercise no investigative or prosecuting functions." (*Attorney General's Manual on the Administrative Procedure Act,* pp. 55-56.)

It is clear that the Immigration Service did not comply with the provisions requiring the separation of functions. District Directors and other personnel who are concerned with investigation and prosecution supervise Boards of Special Inquiry. There is no organizational unit of hearing officers set apart and responsible to agency officers, who exercise no prosecuting functions. The separation of functions has not been published in the form of rules and regulations pursuant to section 3 of the Act. Can the Immigration Service claim exemption from these requirements?

The Government admits that a statutory hearing is held but asserts the novel view that the admission of aliens "seemed to fall within the (exempting) provisions of section 5 (c)relating to initial licenses" (*House Report 2140, 80th Congress, 2nd Session,* p. 4). Until now, neither the Courts nor the Government have ever referred to the appli-

cation for admission of an alien as an application for an "initial license." Generally the initial permission to enter the United States is granted by an American Consul abroad. The Service merely rechecks the alien's admissibility. There is no provision in our immigration statutes authorizing the Commissioner to issue licenses to aliens seeking admission to our shores. The statutes do not contemplate a licensing procedure. Furthermore, the Immigration Service does not treat an alien, once admitted, as though he has received a license. Section 9 of the Administrative Procedure Act requires notice to the licensee prior to revocation of a license with an opportunity to achieve compliance with the requirements of law. On the contrary, the new visitors regulations consider the visitors' visa cancelled forthwith upon evidence of an intention by words or action to violate the terms of admission. (Federal Register, May 15, 1948; 8 C. F. R. 119.5(3)).

The separation of the prosecuting from the adjudicating function of the Immigration Service was advocated by the Wickersham Commission during the Hoover Administration. (5 National Commission on Law Enforcement, pp. 157, 158). Later Dean Van Vleck (The Administrative Control of Aliens, 1932, pp. 247-250) made similar suggestions. In 1940, the Secretary of Labor's Committee on Administrative Procedure composed of Professors Marshall Dimock, Henry M. Hart and John McIntire recommended that "presiding inspectors be relieved of their present duties of presenting the case against aliens and be confined entirely to the duties customary for a judge." (pp. 81 and see pp. 49 et seq.).

In the light of this history, and the basic purpose of the Administrative Procedure Act, it is proper to conclude that the Immigration Service should "reorganize to comply with the provisions of Section 5 (c) requiring separation of functions," 56 Yale Law Journal at pp. 701 and 702.

3. HEARING EXAMINERS. Section 11 of the Administrative Procedure Act (5 U. S. C. 1010) requires specified hearing examiners in cases of adjudications required by statute. These hearing examiners are to be assigned to cases in rotation, perform no inconsistent duties, and are to receive compensation prescribed not by the agency but by the Civil Service Commission. Section 7 (5 U. S. C. 1006) of the Act exempts from Section 11 "specified classes of proceedings . . . by or before boards or other officers specially provided for by or designated pursuant to statute."

The section 7 exemption "does not mean that agencies are authorized—whether pursuant to the express authority of other statutes or not—to avoid the examiner system—set up in this bill . . . by assigning general employees or attorneys to hear cases individually or as boards. In short, unless the agency or its members or *some specially qualified statutory officer* hears the case, an examiner qualified under section 11 of this bill must do so." (*Congressman Walter, Senate Document No. 248, 79th Congress, 2nd Session*, p. 364. See also p. 268 and *Attorney General's Manual, supra* pp. 71-72).

56 Yale Law Journal 701 states:

> "The committee reports indicate that the exemption should be strictly construed, and in particular that statutory provisions authorizing the use of employees or attorneys generally should not be considered authorization for exemption. However, some statutory boards listed by the Attorney General in the Senate Report as examples of the exempted class seem to fall within the group which the reports indicate is not exempted. The apparent conflict can only be resolved on the grounds that the statutes setting up these boards did not authorize the use of employees generally but rather specified that their members should be selected from among eligible employees designated as such by the agency head."

The article concludes that exemption can be granted to exclusion proceedings only on the basis that members of Boards of Special inquiry were selected not from employees generally but because of their special qualifications.

Boards of Special Inquiry were first provided by statute in 1893. (27 Stat. 569). In 1911 a Congressional Commission completed a report of our immigration system and stated:

> "Boards of Special Inquiry are one of the most, if not the most, important factors in the administration of the immigration laws. . . . The boards exercise a power which if not properly used may result in injustice to the immigrant or, through the admission of undesirable aliens, in harm to the country. It is important, therefore, that these boards should be composed of unprejudiced men of ability, training, and good judgment. . . . At all the important ports the boards of special inquiry are composed of immigrant inspectors, who generally are without judicial or legal training. . . . In justice to the immigrant, and to the country as well, the character of these boards should be improved. They should be composed of men whose ability and training fit them for the judicial functions performed, and the provisions compelling their hearings to be separate and apart from the public should be repealed." (I Reports of the Immigration Commission, pp. 32-33; 1911).

See to the same effect:

Van Vleck, The Administrative Control of Aliens (1932) at pp. 247, 46, 67.

Report of the Secretary of Labor's Committee on Administrative Procedure (The Immigration and Naturalization Service) by Marshall Dimock, Henry M. Hart and John McIntire (1940) at pp. 49 *et seq.*)

The legislative representative of the Association of Immigration and Nationality Lawyers testified in August of

1948 before the Senate Sub-Committee on Immigration with reference to this problem as follows:

> "What was said in 1911 has been repeated through the years and is true almost to the word today. Boards of Special Inquiry at some ports consist of an immigrant inspector, a customs man and a stenographer. In New York it's a little better—there are two inspectors and a stenographer who casts her vote with the chairman of the board. The situation in deportation proceedings is not much better. How can you expect low-paid non-lawyers to preside at hearings, weigh fine points of evidence, citizenship, foreign law and exercise quasi-judicial functions. Many of its good lawyers have left the Immigration Service. If Section II of the Administrative Procedure Act is applied to its proceedings, the Service will be able to retain its good lawyers and attract others. It will be compelled to raise the salaries of hearing examiners and only properly qualified men will preside in judgment in the important process of deportation or exclusion.
>
> "We therefore urge that the Administrative Procedure Act be retained and that if doubt exists as to its application to immigration proceedings, it be made to apply by specific statutory provision."

In the instant case, not a single member of the Board of Special Inquiry was a lawyer. The immigrant inspectors who sat were not required to have any special training. The secretary who sat as a Board member merely had stenographic experience in the Immigration Service. The Government's assumption in its brief in opposition to the petition (p. 25) that "Miss Fairbanks may have had extensive experience as a member of such boards and, therefore, may be better qualified to so act than some immigrant inspectors" does not bespeak well of the qualifications of immigrant inspectors. The government's implication relative to "Miss" Fairbanks' qualifications is as incorrect as its knowledge of the sex of the stenographer who recorded

the minutes of the hearing. A. P. Fairbanks is a male secretary.

As long as stenographers can sit as Board of Special Inquiry members—and this is the practice rather than the exception—individuals without special qualifications other than that possessed by employees generally, are performing the duties of hearing examiners. Boards so composed are not within the exemption of Section 7 of the Administrative Procedure Act.

The purpose of the Administrative Procedure Act was to bring fair hearing procedure into the administrative process. The requirements of adequate notice of the issues, separation of functions and independent hearing examiners were reforms advocated for some time in the exclusion and deportation of aliens. Law and policy alike indicate the soundness of the position taken by appellant.

Conclusion

The judgment below should be reversed because the medical certificate was not conclusively binding and because of its insufficiency. Appellant was not accorded a fair hearing in view of the failure of the Government to conform with the provisions of the Administrative Procedure Act.

Respectfully submitted,

JACK WASSERMAN,
Attorney for the Association of
Immigration and Nationality Lawyers,
501 13th St. N. W.,
Washington, D. C.

GASPARE CUSUMANO,
THOMAS M. COOLEY, II,
Of Counsel.

APPENDIX A

May 28, 1945.

To: Ugo Carusi, Commissioner, Immigration & Naturalization Service.

From: Thos. G. Finucane, Chairman, Board of Immigration Appeals.

In re: Medical certificates.

The Board has experienced considerable difficulty with regard to the sufficiency of medical certificates submitted in immigration proceedings and executed by physicians of the Public Health Service.

The Courts have had occasion to comment on this subject and have indicated their displeasure with the insufficiency of medical certificates submitted in immigration matters. See *United States ex rel Minuto v. Reimer*, 83 F. (2d) 166 (C. C. A. 2d 1936); *United States ex rel Papa v. Day*, 45 F. (2d) 435 (S. D. N. Y. 1930); *United States ex rel Fong On v. Day*, 39 F. (2d) 202, 203 (S. D. N. Y. 1930); *United States ex rel Powlowec v. Day*, 33 F. (2d) 267, 268 (C. C. A. 2d 1929).

In order to comply with these decisions and with section 130.4 of Title 8 C. F. R., the Board suggests that the form of the medical certificate be revised as set forth in the attached proposal. We would appreciate your comments on the attachment.

Attachment.

U. S. Department of Justice
Immigration and Naturalization Service
Medical Certificate

State of .....
County of ..... : ss.
Port of: .....

1. Name of alien: ..... 2. Date of arrival:
3. Steamship: ..... 4. Age:
5. Sex: ..... 6. Occupation:
7. History of case: .....

8. Give an accurate and complete description of the nature and extent of alien's defective condition based upon your personal observation:

9. Alien's complaints, (if any):
10. Present diagnosis and detailed reasons thereof:

11. Did condition exist on date of arrival?
12. If suffering from a disease or tuberculosis, was it in a contagious stage at time of arrival?
13. Is the defect of a temporary or permanent nature? (State prognosis.)

14. To what extent, if any, does the alien's defective condition affect his ability to pursue his usual occupation?

15. Does the alien's defect affect his ability to earn a living?

This is to certify that the above-named person was examined this day of and is found to have the condition diagnosed above.

(Signed) Surgeon, U. S. Public Health Service.
Licensed to practice on (date) Specialty
No. of years
(Signed) Surgeon, U. S. Public Health Service.
Licensed to practice on (date) Specialty
No. of years
Sworn to before me this day of , 19

Immigrant Inspector.